No. 80-1417

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

MARK MILLS, et al.,

Petitioners

v.

RUBIE ROGERS, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF FOR PATIENTS' RIGHTS ADVOCACY SERVICES, INC. AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Can the State of Massachusetts forcibly administer dangerous anti-psychotic medications to involuntarily committed mental patients against their will without violating their Constitutional rights?

2. Is it a Constitutional exercise of state power for the State of Massachusetts to forcibly administer dangerous anti-psychotic drugs on involuntarily committed mental patients against their will in order to prevent their mental deterioration?

3. Are courts Constitutionally required to safeguard the fundamental rights of involuntarily committed mental patients to refuse anti-psychotic drugs by exercising a "substituted judgment" on behalf of patients who have been found incapable of making the decision?

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BRIEF FOR PATIENTS' RIGHTS ADVOCACY SERVICES, INC. AS AMICUS CURAIE

INTEREST OF AMICUS CURAIE

Patients' Rights Advocacy Services ("PRAS") is a non-profit corporation composed of patients' rights advocates and attorneys who represent mental patients in San Francisco when they complain of violations of their rights under federal and California law. PRAS is funded, in part,

by the National Institute of Mental Health to engage in law reform activities in the area of mental health patients' rights. It also provides advocacy services which are mandated by the State of California.

Among the complaints received by PRAS over the course of the last three years, complaints concerning the forcible administration of anti-psychotic medications are by far the most common and the most difficult to resolve. The psychiatric profession in California recognizes no right to refuse anti-psychotic medication among involuntarily committed patients, and patients frequently find that their complaints to hospital staff concerning side effects are interpreted as psychosomatic symptoms of their illness. Advocates at PRAS, acting on behalf of the patients, are left with well-reasoned cases in other jurisdictions and disputed ethical standards of the psychiatric profession as tools for negotiation.

At public hearings on psychiatric drugs, recently held in San Francisco, several authorities, representing both sides of the issue, recognized the unbridled abuses of these medications in California, the alarming nature of their side effects, and the need for resolution of the legal issues involved.

Amicus seeks an affirmation from this Court of the fundamental right of its clients to resist the forcible administration of these dangerous drugs which they, themselves, so often consider a profound invasion of their privacy and an affront to their dignity.

SUMMARY OF ARGUMENT

Involuntarily committed mental patients, have a fundamental right in a non-emergency to refuse medication based in the Constitutional right to privacy, right to bodily integrity and the right to freedom of thought.

The state must therefore show a compelling interest in overriding these rights. The cases consistently show that the state has no interest in depriving patients of these rights in a non-emergency.

Moreover, the state is not granted the authority to forcibly medicate patients as part of the authority to commit them. The right to refuse medication is a fundamental right, and the state must comply with the requirements of procedural due process before the right can be denied. Commitment hearings are insufficient for that purpose in Massachusetts because forcible medication constitutes a major change in confinement and requires additional due process considerations.

Moreover, the state cannot constitutionally deprive patients of their fundamental right to refuse medication by presuming their incompetence once committed. Involuntarily committed patients are presumed to be competent under the law of

Massachusetts and other states. In addition, the requirements of due process do not end with a determination of incompetence. A court must, as a requirement of due process, exercise a "substituted judgment" for those patients who are found incompetent.

In addition, the First Circuit Court of Appeals' expansion of the District Court's emergency standard is unconstitutional since forcible medication to prevent mental deterioration is an unconsitutional exercise of state power. Courts have held that the state cannot constitutionally act under its police power to forcibly medicate involuntarily committed patients in a non-emergency; and under its parens patriae authority the state may only act when a patient has been found incapable to decide and in imminent physical danger. Moreoever, forcible medication will do nothing to further the state's interest in preventing further mental deterioration. Finally,

the Ninth Circuit's expansion of the definition of emergency to include the concept of psychiatric emergency is an unconsitutional delegation of power. The result is an unbridled discretion in the hands of psychiatry, and a usurption by that profession of the judicial power to decide the patients' right to fundamental due process.

ARGUMENT

I. THE STATE OF MASSACHUSETTS IS CONSTITUTIONALLY BARRED IN NON-EMERGENCY SITUATIONS FROM ADMINISTERING DANGEROUS PSYCHOTROPIC MEDICATIONS TO INVOLUNTARILY COMMITTED MENTAL PATIENTS AGAINST THEIR WILL.

A. Forcible Medication Of Involuntarily Committed Mental Patients Violates Fundamental Rights Guaranteed To Them By The Constitution Of The United States

1. Forcible medication of involuntarily committed mental patients violates their fundamental right to privacy in decisions concerning their own bodies. Courts throughout the country have held that all patients have a fundamental right to privacy in deciding whether or not to submit to medical

treatment. Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), cert. granted, No. 80-1417 (April 20, 1981)(hereinafter referred to as "Rogers II"); Runnels v. Rosendale, 499 F. 2d 733 (9th Cir. 1974); Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973); Scott v. Plante, 532 F.2d 939 (3rd Cir. 1976); Rennie v. Klein, 462 F.Supp. 1131 (D.N.J. 1978) (hereinafter referred to as "Rennie I"); Davis v. Hubbard, 506 F.Supp. 506 F.Supp. 915 (N.D. Ohio 1980); Pharmaceutical Society of New York v. Lefkowitz, 454 F.Supp. 1175 (S.D.N.Y. 1978), aff'd 586 F.2d 953 (2d Cir. (1978); Souder v. McGuire, 423 F.Supp. 830 (M.D. Pa. 1976); In re K.K.B., 609 P.2d 747 (Okla. 1980); Guardianship of Roe, ___ Mass. ____, 421 N.E.2d 40 (1981); Goedecke v. State Dept. of Institutions, 603 P.2d 123 (Co. 1979); In re Quinlan, 70 N.J. 10, 355 A.2d 646 (1976); Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977), Kaimowicz v. Mich. Dept. of Mental Health, No. 73-19434 A.W., 42 U.S.L.W. 2063 (Mich. Cir. Ct., Wayne

County, Mich., July 10, 1973).

The fundamental right to privacy exists in the penumbra of rights specifically enumerated in the Bill of Rights. Griswold v. Connecticut, 381 U.S. 479 (1965). This Court, in articulating the right to privacy, has looked to liberty interests contained in the First Amendment freedom of thought, Stanley v. Georgia, 394 U.S. 557 (1969) and the Fourteenth Amendment right to bodily integrity. Roe v. Wade, 410 U.S. 113 (1973).

Forcible administration of anti-psychotic drugs in a non-emergency is inimical to both the right to freedom of thought (Scott v. Plante, supra) and the right to bodily integrity (Rennie v. Klein, Nos. 79-2576 and 79-2577 (3rd Cir., July 9, 1980) (hereinafter referred to as "Rennie II).

After examining these Constitutional underpinings in Roe, this Court concluded that the fundamental right to privacy is "broad enough to encompass a woman's deci-

sion whether or not to terminate her pregnancy." Roe v. Wade, supra at 153. In arriving at that conclusion the Court considered the fact that "[s]pecific and direct harm . . . may be involved." Id. at 153. Specifically, they noted the potential for physical and psychological harm and social stigma that could last a lifetime.

The District Court below made specific findings concerning the immediate and future harm caused by anti-psychotic medications. Rogers v. Okin, 478 F.Supp. 1342, 1360 (D. Mass. 1971), aff'd in part, rev'd in part, and remanded, 634 F.2d 650 (1st Cir. 1980) (hereinafter referred to as "Rogers I"). The court found that the drugs influence chemical transmissions to the brain and are mind-altering, and described a whole series of immediate neurological side effects which have led another court to describe these drugs as "painful and frightening," Souder v. McGuire, supra at 832.

In addition, the court noted significant side effects involving physical

neurological damage which is irreversible, and which may result in serious psychological and physical disabilities. Foremost among these side effects found is tardive dyskenisia. Tardive dsykenisia is a disease characterized by involuntary movement, which can interfere with swallowing and effect all motor activity. The court pointed to two studies which showed the incidence of tardive dyskenisia among chronically hospitalized schizophrenics to be between 50% and 56%.[1/]

For these reasons, the right to privacy articulated in Roe is broad enough to encompass a patient's decision as to whether to accept or to refuse anti-psychotic medications. Scott v. Plante and Davis v. Hubbard, supra. Consequently, the First Circuit Court of Appeals, below, reasoned soundly when they stated:

1/ See Rennie I, supra at 1300-1303 for that court's findings for the specific effects of forced medication on the individuals involved in that case.

> We begin our analysis with what seems to us to be an intuitively obvious proposition: a person has a constitutionally protected interest in being left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs. . . . [T]his interest exists, most likely as part of the penumbral right to privacy, bodily integrity or personal security.
>
> None of the parties or amici in this suit contest the correctness of this general proposition. Rogers II, supra at 653-654 (citations omitted). 2/

2. Forcible medication of involuntarily committed mental patients violates their fundamental right to bodily privacy and personal security guaranteed by the Fourteenth Amendment to the United States Constitution. This right traces its origin to tort law principles enunciated in Canterbury v. Spence, 150 U.S.App.D.C. 263, 464 F.2d 772 (D.C. Cir.), cert. denied 409 U.S. 1064 (1972) and Schloendorff v. Society of N.Y.

2/ Despite this contention by the court, Petitioners argue on page 17 of their brief that Respondents have no constitutional right to refuse medication.

Hospitals, 211 N.Y. 125, 105 N.E. 92, 93 (1914) where Justice Cardozo stated: "Every human being of adult years or sound mind has the right to determine what shall be done with his own body." See also, Union Pacific R. Co. v. Botsford, 141 U.S. 250 (1891).

In Ingraham v. Wright, 430 U.S. 651 (1977), this Court recognized that this right, held so sacred and so carefully guarded by the common law, is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. The Court held:

> Among the historic liberties was a right to be free from and to obtain judicial relief for unjustified intrusions on personal security.
>
> While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint. . . . See Rochin v. California, 342 U.S. 165 (1952).

Id. at 672. In support of that Due Process right, the Court cites Skinner v. Oklahoma, 316 U.S. 535 (1942), Jacobson v. Mass., 197

U.S. 11 (1905), and Union Pacific R. Co. v. Botsford, supra.

Moreover, it is clear that this right to bodily integrity and personal security is a "fundamental" right. See Rochin v. Calif., supra at 169. One authority has concluded that "no more basic aspect of personal privacy can be found than bodily integrity, and this interest is entitled to concommitant constitutional protection." Cantor, "A Patient's Decision to Decline Lifesaving Medical Treatment: Bodily Integrity v. The Preservation of Life," 26 Rutgers Law Review 228, 242 (1973).

Consequently, in these cases, this Court has weighed the extent of bodily harm and intrusiveness against the state interests involved. In Rochin, supra, the Court was faced with a situation where contraband had been forcibly pumped from the stomach of a protesting defendant. The Court looked to the force and brutality used in that case and analyzed the law in this way:

> Due process of law is a summarized constitutional guarantee of a respect for those personal immunities which, as Mr. Justice Cardozzo twice wrote for the Court are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Snyder v. Massachusetts, 291 U.S. 97, 105, or are 'implicit in the concept of ordered liberty.' Palko v. Connecticut, 302 U.S. 319, 325. (Id. at 169.)
>
> It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record. (Id. at 174.)

In Breithaupt v. Abram, 352 U.S. 432 (1957), the Court recognized that same Due Process right, citing Rochin. In that case a blood test was performed on an unconscious defendant in order to determine criminal liability for drunken driving. The Court, however, found no evidence of harm, brutality or violation of human dignity in performing a routine blood test on an unconscious defendant. On the other hand, the Court found a compelling state interest in preventing deaths on the highways. Id. at

435, 436. For these reasons, the Court upheld the lower court's criminal conviction.

In Jacobson, supra, the Court ruled on a Massachusetts statute which required all citizens to submit to a smallpox vaccination. On the facts of that case the Court held that the "police power of a state" (Id. at 38) overrode the Fourteenth Amendment right because of the important state interest in controlling a smallpox epidemic. However, the Court clearly indicated that the result hinged on the fact that no case of harm to the individual had been presented. They even went so far as to read a gloss onto the statute to preserve the fundamental Fourteenth Amendment right to bodily integrity involved in that case:

> [W]e are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccina-

> tion, or that vaccination, by reason of his then condition would seriously impair his health. Id. at 38, 39.

This right has been used to uphold the refusal by patients of medical intervention in other contexts. In Saikewicz, supra at 424, the court recognized a right of an incompetent mentally retarded person to refuse chemotherapy for leukemia based upon that person's right to bodily integrity and personal security. In Kaimowitz, supra, the court held that non-consensual experimental psychosurgery performed on a mental patient constitutes a violation of bodily integrity.

In balancing the interests according to the principles enunciated in these cases, it is clear that forcible administration of dangerous anti-psychotic medications to unwilling mental patients violates their Due Process right to bodily integrity and personal security.

As noted above these drugs cause serious side effects which are frightening and immediate. They also cause physical and

psychological damage which is irreversible for significant numbers of people. For these reasons, in Guardianship of Roe, supra at 52, the court stated: "We can identify few legitimate medical procedures which are more intrusive than the forcible injection of anti-psychotic medication." Certainly, the forcible administration of these drugs is more intrusive, more violative of bodily integrity, personal security and human dignity than an almost risk-free and painless, routine blood test or the equally risk-free vaccination for smallpox.

Moreover, it has been consistently held that the state has no interest in forcibly medicating mental patients in non-emergency situations. See Argument IB, below.

Consequently, based upon the right to bodily integrity and personal security, the courts below and other courts have upheld the right of mental patients to refuse anti-psychotic medications. Rennie I, supra and Scott v. Plante, supra.

3. Forcible medication of involuntarily committed mental patients violates their First Amendment right to the free generation of ideas.

In 1919, the Court stated that the First Amendment meant that the government does not have the power to control men's minds. Abrams v. United States, 250 U.S. 616, 630 (1919). In O'Connor v. Donaldson, 422 U.S. 563, 575 (1975), the Court stated that a state could not constitutionally "fence in the harmless mentally ill solely to save its citizens from those whose ways are different." The cases of Olmstead v. United States, 27 U.S. 479 (1928); Stanley v. Georgia, supra; Roe v. Wade, supra; and United States v. Reidel, 402 U.S. 351 (1971) have all found a fundamental right to privacy in the realm of thought and decision.

The District Court in this case applied the principles of those cases and held that the forcible administration of anti-psychotic drugs violated mental patients' First

Amendment right to think in that those drugs "affect and change a patient's mood, attitude and capacity to think." Rogers I, supra at 1366. The court in Rogers stated:

> Without the capacity to think, we merely exist, not function. Realistically, the capacity to think and decide is a fundamental element of freedom.

Id. at 1367. In Mackey v. Procunier, supra at 877 forcible administration of a drug in connection with shock therapy was held to be an "impermissible tinkering with the mental process" in violation of the First Amendment. See also Scott v. Plante, supra at 946.

In Kaimowitz, supra, the court was asked to rule on the First Amendment claims presented by the non-consensual administration of psychosurgery. That court held:

> A person's mental processes, the communication of ideas, and the generation of ideas, come within the ambit of the First Amendment. To the extent that the First Amendment protexts the dissemination of ideas and expression of thoughts, it equally must protect the individual's right to generate ideas. Id. at 477.

Quoting Justice Cardozo, the court said: "Implicit . . . in the very notion of liberty is the liberty of the mind to absorb and beget." Id. at 477.[3/]

The court in Guardianship v. Roe, supra at 53 indicated that because of the profound effect that anti-psychotic medications have on thought processes, courts must afford the same protections to patients receiving these drugs as is afforded to patients who undergo psychosurgery. Consequently, the same First Amendment protections apply.[4/]

3/ The magnitude of the First Amendment concerns in this case is more fully appreciated when one examines the "symptoms" of mental illness which psychiatrists diagnose and treat with medication. In The Diagnostic and Statistical Manual III, 3d ed. 1980 (the official diagnostic manual of the American Psychiatric Ass.) (hereinafter referred to as "DSM-III"), one of the symptoms of schizophrenic disorder is described as "poverty of content of speech, in which speech is adequate in amount but conveys little information because it is vague, overly abstract or overly concrete, repetitive or stereotyped." There is no question that it is nonetheless speech and free thought.

4/ It is compelling to note in this regard that other courts have noted that these mind-altering drugs may prevent mental patients from being able to exercise their procedural due process rights. Doe v. Gallinot, No. 80-5658, (9th Cir. September 20, 1981). Davis v. Hubbard, supra.

B. The State Of Massachusetts Has No Interest In Forcibly Administering Dangerous Anti-psychotic Medications To Involuntarily Committed Mental Patients In Non-Emergency Situations.

Since the involuntarily committed mental patients in this case have fundamental rights to privacy, bodily integrity and freedom of thought (see Argument IA, above), the State of Massachusetts must show a compelling interest in order to overcome those rights. Shapiro v. Thompson, 194 U.S. 618, (1959).

The state in the instant case can show no interest to justify their forcible medication of involuntarily committed mental patients in a non-emergency. See, e.g., Davis v. Hubbard, supra and Rogers II, supra.

Moreover, the ruling of the court below on this point is consistent with the rulings of other cases involving the right to refuse treatment.

For example, in Saikewicz, supra, the court made this analysis of the states' interests in cases involving the right to re-

fuse treatment:

> [A] survey of recent decisions involving the difficult question of the right of an individual to refuse medical intervention or treatment indicates that a relatively concise statement of countervailing State interests may be made. As distilled from the cases, the State has claimed interest in (1) the preservation of life (2) the protection of the interests of innocent third parties (3) the prevention of suicide and (4) maintaining the ethical integrity of the medical profession.

Id. at 425. See also Guardianship of Roe, supra at 59.

The District Court in this case held "that a committed mental patient may be forcibly medicated in an emergency situation in which a failure to do so would result in a substantial likelihood of physical harm to that patient, other patients or to staff members of the institution." Rogers I, supra at 1379.

This standard indicates that the state police power may properly be exercised and the patient forcibly medicated in situations where the state has an interest in preventing

physical harm to the patient (e.g., suicide) or others. Therefore, the District Court in this case found the first three interests mentioned in Saikewicz, supra, to be sufficiently compelling to justify forcible medication in an emergency.

Consequently, the only interest mentioned in Saikewicz which the state may assert as justifying its forcible medication of mental patients in non-emergency situations is the maintenance of the ethical integrity of the medical profession. According to the American Psychiatric Association (hereinafter referred to as "APA"), forcible medication of mental patients in non-emergency situations is inconsistent with the maintenance of the ethical integrity of the medical profession. See Rogers I, supra at 1370, n.37. In Rennie v. Klein, 476 F.Supp. 1342, 1370, aff'd in part, rev'd in part, Nos. 79-2576, 79-2577 (3rd. Cir. July 9, 1981), cert. denied, ___U.S.___, 110 S.Ct. 3059, 69 L.Ed.2d 425 (1981), the court relied heavily on two clinical studies

which led them to conclude that the right of mental patients to refuse anti-psychotic medications in non-emergency situations would serve to maintain the ethical integrity of medical standards:

> The court is convinced that where patients' concerns and feelings may be more freely aired, and observable side effects are more closely monitored, medication will be used more wisely. If the refusals of involuntarily patients are fairly acknowledged and independently considered in accordance with the legal criteria, a significant number of patients will receive less or no medication, frequently to their benefit.

Id. at 1306. See also Van Putten, "Why Do Schizophrenic Patients Refuse to Take Their Drugs?", 31 Arch. Gen. Psychiatry 67 (1974) and Van Putten and Ray, "Subjective Response as a Predictor of Outcome in Pharmacotherapy," 35 Arch. Gen. Psychiatry 477 (1978).5/

5/ Moreover, authorities on the use of anti-psychotic drugs have recently stated at public hearings in San Francisco that the requirement of consent is clinically superior to forcing these medications on protesting patient. Public Hearings on Psychiatric Drugs, held on July 23, 1981 at San Francisco, California.

Assuming, arguendo, that the state has an ethical interest in forcing dangerous medications on patients in non-emergencies, the interest is not sufficiently compelling to override the important Constitutional rights involved. See Saikewicz, supra at 427:

> [I]f the doctrines of informed consent and right to privacy have as their foundations the right to bodily integrity,[see Botsford, supra] and control of one's fate, then those rights are superior to the institutional considerations. . . .

See also In re Quinlan, supra.

Similarly, the state's institutional concerns for order and control are insufficient to override the patients' fundamental right to refuse anti-psychotic medications. Nelson v. Heyne, 355 F.Supp. 451 (N.D. Indiana 1973).

Moreover, the state's obligation to provide treatment (see O'Connor, supra) cannot be interpreted as a state's interest which overrides the patient's fundamental

rights. See Rogers I, supra.

C. The State Of Massachusetts Cannot Constitutionally Deprive Mental Patients Of The Right To Refuse Medication By Merely Committing Them Against Their Will.

1. Commitment hearings in Massachusetts do not comport with what due process requires before the right to refuse medication can be denied. The cases cited in Argument IB, above, clearly establish that involuntarily committed mental patients have a fundamental Constitutional right to refuse medication. It is axiomatic that, as a matter of substantive due process, a state must show a compelling interest in order to deny a fundamental right. Shapiro v. Thompson, supra.

Consequently, just as a state must comply with the requirements of due process in depriving a mental patient of the fundamental right to liberty (Doremus v. Farrell, 407 F.Supp. 509, 514 (D.Neb. 1975); Lessard v. Schmidt, 349 F.Supp. 1078 (E.D. Wis. 1972); Lynch v. Baxley, 386 F.Supp. 378 (M.D. Ala. 1974)), so must a state comply

with the requirements of due process in depriving a mental patient of the fundamental rights of privacy and bodily integrity which are involved in the patient's decision to refuse or accept anti-psychotic medication. Rennie II, supra at 13; Scott v. Plante, supra at 946; Winters v. Miller, 446 F.2d 65 (2nd Cir.), cert. denied 404 U.S. 985 (1971); Covington v. Harris, 419 F.2d 617, 624 (D.C. Cir. 1969); Davis v. Hubbard, supra at 938.

Moreover, it is clear that an adjudication authorizing commitment does not per se authorize the forcible administration of anti-psychotic medications. The state's interests which might override a patient's right to liberty do not also override the patient's right to refuse medication. As the court pointed out in Rogers I, supra:

> The patient is in an institution only because he is unable to function safely in society, and so there is a public interest in civil commitment. Id. at 1367.
>
> After commitment, the balancing of state versus patients'

> interests must be done in the context of the community setting.
>
> That the state may forcibly medicate a committed patient given an emergency that threatens the physical safety of patients and staff -- the institutional community -- is not the issue. Such action is necessary to protect the members of that community and is consistent with the basic rationale relied on in Jacobson. Given a non-emergency, however, it is an unreasonable invasion of privacy, and an affront to basic concepts of human dignity, to permit forced injection of a mind-altering drug into the buttocks of a competent patient unwilling to give informed consent. That type of treatment is not necessary to protect the general public, since the patient has already been quarantined by commitment. Of course, there being no emergency, the hospital community is in no danger. Id. at 1369.

The Court in Davis v. Hubbard, supra, comes to the same conclusion, reasoning from the principles enunciated in O'Connor, supra:

> Having been institutionalized, they [patients] no longer present a danger to society and, indeed, may not present a danger to those in the institution. To the extent this is true, O'Connor suggests that such patients cannot further be deprived of constitutionally protected interests by treating

> the symptoms of an illness with drugs merely because the symptoms of the illness are strange and eccentric behavior. In other words, if not dangerous, something more than the fact of mental illness is required before the state may ignore the patient's interests.

Davis v. Hubbard, supra at 936, n.27. See also Addington v. Texas, 441 U.S. 427 (1979).

The reasoning of these cases indicates that mental patients do not automatically lose all of their rights upon being committed. It is clear that the patient "retain[s] a residuum of liberty that would be infringed by compulsory medication 'without complying with minimum requirements of due process.' Vitek v. Jones, 445 U.S. at 491." Rennie II, supra at 13.

The court in Rennie II reasoned that just as "solitary confinement 'represents a major change in the conditions of confinement' in a prison setting, Wolff v. McDonnell, 418 U.S. at 571-72, n.19, so "compulsory medication of a non-consenting patient with its concomittant risks must be

deemed a 'major change in the conditions of confinement.'" Id. at 13 and 14. See also Morrissey v. Brewer, 408 U.S. 471, 482 (1972).[6/]

The Court has held that prisoners are not stripped of all of their rights when confined in a prison, Wolff v. McDonnell, 418 U.S. 539, 555-556 (1974), and so the court in Rennie II has concluded that "the Constitution is at least as viable behind the walls of a psychiatric hospital as in a prison." (citations omitted) Id. at 19.

2. The State of Massachusetts may not deprive involuntarily committed mental patients of their right to refuse medication by presuming their incompetence.

The vast majority of cases ruling on the point presume involuntarily committed mental patients to be competent. Rogers II, supra at 659; Rennie II, supra at 19; Colyar

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6/ There is dictum to the contrary in Price v. Sheppard, 307 Minn. 25, 239 N.W.2d 905, 911 (1976)

v. Third Judicial District Court for Salt Lake County, 469 F.Supp. 424 (D.Utah C.D. 1979); Cameron v. Mullen, 128 U.S.App.D.C. 235, 244, n.29, 387 F.2d 193, 202, n.29 (D.C. 1967); Vecchione v. Wohlgemuth, 377 F.Supp. 1361 (E.D. Pa. 1974); In re Boyd, 403 A.2d 744 (D.C. App. 1979); and In re K.K.B., supra. This is also reflected in the statutes of many states. See "State Laws Governing Civil Commitment," 3 M.D.L.R. 206 (1979). In addition, the District Court in this case found that "although committed mental patients do suffer at least some impairment of their relationship to reality, most are able to appreciate the benefits, risks, and discomfort that may reasonably be expected from receiving anti-psychotic medications. This is particularly true for patients who have experienced such medication . . ." Rogers I, supra at 1361.

Moreover, a determination of incompetence does not automatically deprive involuntary mental patients of their right to

to refuse medication. "A state cannot ignore due process and simply seize a person and administer drugs to him without his consent." Rennie II, supra at 13. See also Argument I C,1, above. While due process requires that there be a judicial determination of incompetence prior to a state's exercise of parens patriae authority (see Vecchione v. Wohlgemuth, supra), that determination, alone, does not comport with what is required by due process in order to deny mental patients' right to refuse medication. Rogers II, supra at 661. The Ninth Circuit in this case has stated:

> [W]e do not imply that the Constitution places no limits whatsoever on the manner in which the state may decide how to treat incompetent patients.

Id. at 661. See also Argument III, below. As the court noted in Colyar, supra at 430: "An individual's diminished capacity should not and does not affect the protection owed him when the state attempts to deprive him of his liberty."

II. FORCIBLE ADMINISTRATION OF DANGEROUS PSYCHOTROPIC DRUGS TO PREVENT FURTHER MENTAL DETERIORATION IS AN UNCONSTITUTIONAL EXERCISE OF STATE POWER.

A. Legitimate Exercise Of The State's Emergency Police Powers Is Not Triggered By The Concept Of Psychiatric Emergency.

The primary justification for compulsory confinement of psychiatric patients as a function of the police power is the protection of the public from dangerously ill individuals. See, e.g., Jacobson v. Mass., supra 24, 25. Because the police power protects the public, it is by nature "the least limitable of the exercises of government." Hall v. Geiger-Jones Co., 242 U.S. 539, 548 (1917). Accordingly, it is because the mentally ill individual is presently dangerous to others that he forfeits his right to refuse treatment (see Argument I).

> However forcible anti-psychotic medication of a patient in a state hospital is not necessary to protect the general public. The public is protected by commitment. If there is no emergency, hospital personnel are in no danger; the only purpose of forcible

> medication in these circumstances would be to help the patient. In re K.K.B., supra at 751.

Therefore, if the purpose of the state is to protect the mental health of the individual, and not to promote the safety of others, it must act pursuant to its parens patriae authority: "The state's purpose in administering drugs forcibly must be to further its police power interests." Rogers II, supra at 656.

B. A Judicial Determination of Incapacity To Act Is Required Before The State Acts As Parens Patriae.

The parens patriae function is an authority granted to the state by the members of the community for the protection of their future well-being. See J. Rawls, A Theory of Justice, 248-49 (1971). Accordingly, when the state acts as parens patriae, it is not empowered to sacrifice the welfare of the individual to the welfare of others. See In re Colah, (The Parsee Merchant's Case) 3 Daly 529, 537-39, 11 Abb.Pr.(n.s.) 209,

219-22 (N.Y.C.P. 1871).

Therefore, when the state acts pursuant to the legitimate exercise of its parens patriae function, it is authorized to deny the individual no right. This is critical to understanding why the state, acting as parens patriae, is not empowered to administer dangerous psychotropic medications on an unconsenting involuntarily committed patient absent a judicial determination of incompetence to act. Winters v. Miller, supra; Scott v. Plante, supra; Coylar v. Third Judicial District Court, supra. Similarly, the Court of Appeals below was compelled to conclude:

> [A]bsent an emergency, a judicial determination of incapacity to make treatment decisions must be made before the state may rely on its parens patriae powers to forcibly medicate a patient. Rogers II, supra at 661.

Thus, the crucial question is whether or not the state may forcibly medicate an individual, absent a judicial determination of incompetence to act, solely because it is

reasonably believed that any delay could result in significant deterioration of the patient's mental health.

1. The State has no authority to act as parens patriae unless the individual's mental deterioration also poses an imminent danger to his physical health.

An individual cannot be involuntarily committed pursuant to the state's parens patriae authority unless the individual is dangerous to himself. (O'Connor v. Donaldson, supra; In re Ballay, 157 U.S. App. D.C. 59, 482 F.2d 648 (1973); Doremus v. Farrell, supra; and Lynch v. Baxley, supra. A person is dangerous to himself not because he is mentally ill, but because he is unable to provide himself with the basic necessities to sustain physical life or because he is self-assaultive:

> An individual who cannot provide for himself the basic necessities of life (food, clothing, shelter) or who inflicts physical damage on himself . . . does pose a threat to his own well-being. Coylar, supra at 430.

Compulsory administration of dangerous psychotropic drugs to prevent further mental deterioration, in the absence of a threat to the individual's physical well-being, allows the state to intrude upon fundamental rights only because the individual is mentally disordered. (See Argument I.) The state is clearly prohibited from thrusting treatment on an individual only because he is diagnosed mentally disordered. O'Connor, supra.

Moreover, since legal incapability to decide whether or not to accept treatment is a threshold requirement when the state acts as parens patriae, even if a mentally disordered individual does pose a threat to his physical well-being, but nonetheless remains competent to make a treatment decision, the state cannot constitutionally interfere:

> The state's interest in protecting him from harm does not outweigh the competent individual's right to make and carry out what is perhaps, one of the most important decisions of his life.

Coylar, supra at 432; cf. Winters, supra.

2. The concept of psychiatric emergency will not further the state's interest in preventing further mental deterioration or chronicity of mental disorder.

The State of Massachusetts' forecast that the right to refuse dangerous psychotropic drugs will result in deterioration of psychiatric patients' mental health, including increased psychic suffering and increased chronicity of mental disorder, is unfounded. The class of individuals whose mental disorders are responsive to crisis intervention in the form of forced administration of psychotropic drugs are already subject to forced medication pursuant to the rightful exercise of the state's police power.[7/] The state is empowered to forcibly

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7/ It is important to stress that psychiatrists do not treat violence. Rather, they treat mental disorders. However it is the presence of violence or the threat of violence that empowers the state, through psychiatrists, to act in the absence of a judicial proceeding. (See Argument II, infra.) That the state acts pursuant to its police power does not mean that the action taken is not de facto in the individual's, as well as society's, best interest.

medicate these individuals because they inevitably present exhibiting violent behavior.8/

However, the class of patients the state claims it must treat as a result of psychiatric emergency do not therapeutically respond to the forced administration of psychotropic drugs. As pointed out by the State of Massachusetts:

> About half of the available hospital beds for mentally ill and mentally retarded patients (and one-quarter of all available hospital beds) are occupied by schizophrenics.

Petitioner's Brief at p.24, citing Berger, Hamburg and Hamburg, "Mental Health: Progress and Problems," 106 Daedalus 261

8/ See DSM-III (a manual which is used by virtually every agency of the Government to diagnose mental disorder). See generally "Substance-Induced Organic Mental Disorders," pp. 128-36, including §§ 303.00, 291.40, 291.30, wherein are described the type of disorders responsive to forced drug administration. These disorders are characterized by aggressive, beligerent, physically assaultive behavior, that is etiologic specific. Recovery occurs within a matter of days.

(1977); J.A., p.207 (J.-166). The significance of this important observation is that in order to make a diagnosis of schizophrenic disorder, a finding of substantial deterioration from a previous level of functioning must be made. (See DMS-III, supra at 181-182.) Therefore, should the concept of psychiatric emergency be adopted by this Court, all chronic, severely psychotic individuals, including but not limited to those with schizophrenic disorders, will be forcibly medicated only because they are "mentally disordered." That the state cannot invade fundamental rights only because an individual is mentally ill is axiomatic. (O'Connor, supra.)

Furthermore, the contention that severe disabling psychotic disorders, including the schizophrenic disorders, have an initial phase, wherein the immediate administration of anti-psychotic drugs will prevent substantial mental deterioration or chronicity, is insupportable. (See DSM-III,

supra at pp. 181,184, and 185.) The primary characteristic of the schizophrenic disorders is that the course of illness is chronic and cyclic. In almost every case, periods of substantial deterioration followed by remissions occur no matter what form of treatment is prescribed: "A complete return to premorbid functioning is unusual -- so rare, in fact, that some clinicians would question the diagnosis." Id. at 185. It was precisely this observation that led the court in Rennie v. Klein, 476 F.Supp. 1294, aff'd in part, rev'd in part, Nos. 79-2576, 79-2577 (3rd Cir. July 9, 1981), cert.denied, ___U.S. ___, 110 S.Ct. 3059, 69 L.Ed.2d 425 (1981) to conlude: "Many patients who would normally be treated with anti-psychotics can improve without them . . . " Rennie v. Klein, 476 F.Supp. at 1298. See also Davis, supra at 936,937 and In re K.K.B., supra at 748.

However, the APA has set forth what care individuals require during the deter-

iorative phases of psychiatric disorders:

> Supervision may be required to ensure that nutritional and hygienic needs are met and to protect the individual from the consequences of poor judgment. DSM-III at 185. 9/

3. Expansion of the definition of emergency to include the concept of psychiatric emergency denies involuntarily committed patients equal protection of the laws.

The definition violates involuntarily committed patients' right to equal protection because it draws a purposeless distinction between physically deteriorating medical patients and psychologically deteriorating psychiatric patients.10/ The State of Massachusetts attempts to avoid the strictures of equal protection by interposing the

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9/ The importance of ensuring that the individual's basic physical safety and dignity needs are attended to is repeated throughout the manual wherever severe, chronically disabling psychotic disorders are described. See, e.g., DSM-III, §§ 295.1x; 295.2x.

10/ "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." Baxstrom v. Herold, 383 U.S. 107, 111 (1966).

concept of psychiatric emergency. However, the attempt fails because the only rational distinction that can be drawn between a psychiatric patient and a medical patient is incompetence to act. As a result, state action which utilizes the presence or absence of mental disorder, rather than incapability to act, to separate those who may be treated from those who may not, fails to provide a rational basis for such disparate treatment. Winters, supra and Lessard, supra. This contention is based on the notion that individuals may not be deprived of their freedom solely because they are mentally ill. O'Connor, supra.

The concept of psychiatric emergency does nothing to salvage the irrational distinction because it fails to distinguish between a mentally deteriorating patient who is capable of making a treatment decision and a mentally deteriorating patient who is not. As a result, acceptance of the concept of psychiatric emergency would,

in practice, amount to a presumption that an individual is incapable to act solely because the state reasonably believes that the administration of dangerous psychotropic drugs is medically indicated to prevent further mental deterioration. Such action clearly denies involuntarily committed patients equal protection because it fails to "leave room for the individual who would rather remain free of therapeutic intervention even though that freedom is obtained at the price of diminished functional capacity." Coylar, supra at 434; cf. O'Connor, supra.

To accept the notion that involuntarily committed patients may be forcibly medicated to prevent further mental deterioration, compels the conclusion that the state could, acting as parens patriae, force a cancer victim to submit to dangerous chemotherapy only because the state believed such forced administration of drugs might prevent further metastisis.

Finally, in order to understand why the concept of psychiatric emergency fails to make a rational distinction between psychologically deteriorating psychiatric patients and physically deteriorating medical patients, one need only explore the relationship between medical treatment and the concept of emergency. Because psychiatry is a discipline of medicine, its authority to render treatment is likewise circumscribed:

> Medical treatment is a service performed on an individual who has requested or permitted it or whose condition requires it. Those who provide or perform the service should do so only when it is authorized by the patient or by law. Warren, David G., Problems in Hospital Law (3rd ed. 1978).

Therefore, the authority of the psychiatrist to proceed in emergencies that implicate only the patients' interests, including the administration of dangerous psychotropic drugs to prevent further mental deterioration, assumes "that the patient has not expressly refused the

treatment." Id. at 155. Consequently, courts have consistently held that an adult patient who is concsious and mentally capable has the right to refuse any medical procedure. (See Argument I.)

Moreover, courts have repeatedly emphasized that the legally capable patient's refusal may not be disregarded only because such refusal is not in the patient's best medical interests.[11/] This notion is so axiomatic that the courts are restrained from ordering a blood transfusion solely to protect the patient's health, even though the patient's refusal approximates the taking of his own life. (See, e.g., Erickson v. Dilgard, 44 Misc.2d 27, 252 N.Y.S.2d 705 (1962).

11/ The legally capable individual's refusal to accept treatment must be honored whether such refusal is grounded upon the doubt that the contemplated treatment will not be successful, a concern about the probable or possible results of such treatment, a lack of confidence in the physician, a religious belief, or a mere whim. See, e.g., Winters v. Miller, supra and In re Brooks Estate, 32 Ill.2d 361, 205 NE2d 435 (1965).

Clearly, then, the two factors needed to establish an emergency that negates the need for consent are not present in the concept of psychiatric emergency:

> [F]irst, the inability of the patient or someone on his behalf to give consent, and, second, a threat to the life or health of the patient which is deemed to be an immediate one." Problems in Hospital Law, supra at 155. (Emphasis added.) 12/

4. Expansion of the definition of emergency to include the concept of psychiatric emergency is an unconstitutional

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12/ The concept of psychiatric emergency not only fails to permit a legal determination of incapability to act, it also fails to present the requisite degree of immediacy of harm implicit in the concept of emergency. The courts early on defined the degree of harm required to create a medical emergency. No medical emergency exists unless there is a threat of irreversible harm. See, e.g., Zoski v. Gaines, 260 N.W. 99 (Mich. 1935). There is no evidence in the literature to demonstrate that delay in the administration of psychotropic drugs presents even a substantial possibility of harm. To the contrary, the weight of evidence demonstrates that immediate forced administration of dangerous psychotropic drugs not only fails as a means of curative intervention, but that such action fails to meet the care and treatment needs of the class of mentally disordered individuals that the State of Massachusetts seeks to protect. (See Argument IIB, supra.)

delegation of legislative power.

Expansion of the definition of emergency to include the concept of psychiatric emergency violates the Constitution's ban on delegation because it fails to insure that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. Nor does it prevent judicial review from becoming merely an exercise at large, because it fails to provide the courts with some measure against which to judge the official action that has been challenged. See Arizona v. California, 373 U.S. 546 at 626 (1963),(Harlan, J., dissenting in part).13/

That the legislature is constitutionally empowered to pass laws designed to

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13/ This statement is an exegesis on the non-delegation doctrine's relationship to the separation of powers. However, the same functions are performed by the Due Process Clause. The ban on delegation sprang from the Fifth Amendment's Due Process Clause. As such, its application to the state's is really a function of fundamental fairness, acting as a bar against unbridled discretion.

safeguard the health, safety and morals of the people cannot be questioned.[14/] But the

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14/ Massachusetts has an interest in ensuring that individuals who are committed to its psychiatric institutions are given the opportunity to receive the most expert care possible. As a result, the State of Massachusetts, as virtually every other state in the Union, has promulgated statutes that either implicitly or explicitly delegate decision-making power to private psychiatry. See, e.g., ch. 123, §53, M.G.L.A. (1980)[Qualifications of physicians certifying mental illness; copies of certificate]; ch. 19, §10, M.G.L.A. (1980)[Programs for training of residents in psychiatry, etc.].

As a result of this delegation of decision-making power, it is the APA who determines what diagnostic criteria is legally required before an individual can be legally deemed mentally disordered. Noteworthy is the fact that the State of California explicitly delegates this power to the APA in Title 9 of its Administrative Code which in pertinent part reads: Mental Disorder.

> For the purposes of Division 5 of the Welfare & Institutions Code, "mental disorder" means any of the mental disorders as set forth in the Diagnostic and Statistical Manual of Mental Disorders (Current Edition of the American Psychiatric Association). (Cal. Adm. Code, §813.)

Therefore, unless the APA determines that an individual's behavior is mentally disordered, the individual cannot be legally committed. Moreover, since individuals must be diagnosed according to the latest standards defining mental disorder, an individual who was mentally disordered under DSM-II criteria (DSM-III's predecessor), may not be disordered under DSM-III criteria. The result is that each edition of the APA's diagnostic and statistical manual has the force of positive law. Each manual's criteria supercedes the former's. As a

expansion of the definition of emergency to include the concept of psychiatric emergency allows the legislature to delegate rule-making powers that it cannot. Could the legislature enact a statute stating that private psychiatry is Constitutionally empowered, in the absence of any legal confines whatsoever, to forcibly administer dangerous psychotropic drugs if the DSM-III indicates such action is medically reasonable?

(Footnote 14 continued)

result, the APA's criteria defining the various mental disorders is directly read into the mental health statutes of every state. This result is not objectionable for the sound reason pronounced by this Court in Parham v. J.R., 442 U.S. 584, 607-609 (1979):

> The mode and procedure of medical diagnostic procedure is not the business of judges.

However, the open-ended delegation that will result if this Court accepts the concept of psychiatric emergency is Constitutionally objectionable. The delegation of decision-making power proposed by the State of Massachusetts is Constitutionally barred because its unavoidable consequence is that a grant of legislative power will occur each time the APA publishes new diagnostic criteria. Only the nebulous parameters of the APA's concept of mental deterioration will determine when the state's monopoly on violence, to forcibly medicate an unconsenting patient, will be set in motion.

The concept of psychiatric emergency, confined only to what constitutes substantial mental deterioration within the elusive boundaries of DSM-III, contains the Constitutionally fatal flaw explained by Mr. Justice Cardozo in Schecter Corp. v. United States, 295 U.S. 495 at 551 (1935):

> The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant . . . (Panama Refining Co. v. Ryan, 293 U.S. 388, 440 (1934)).
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> Here . . . is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them.

The concept of psychiatric emergency does not offend the non-delegation doctrine because it allows private psychiatry to determine the standards which ultimately establish the legal sufficiency of the classifications of the various mental disorders. Nor does the concept of psychiatric emer-

gency offend the non-delegation doctrine because it allows private psychiatry to determine when a psychiatric emergency exists as a matter of clinical judgment. (See f.n. 14, infra.) Rather, the delegation is Constitutionally repugnant because it grants private psychiatry the power to determine the subject matter that defines the Constitutional limitations of the exercise of its own authority. This open-ended delegation to private psychiatry fails, not because it does not prescribe particular procedural mechanisms, but because "[i]nstead of prescribing rules of conduct, it authorizes the making of codes to prescribe them." Schecter Corp. v. United States, supra at 541.

Because the concept of psychiatric emergency allows private psychiatry to determine the Constitutional parameters of its own conduct, should this Court accept the notion of psychiatric emergency, it will be equivalent to a grant of state

power to act. Psychiatrists would become the only private group in our society to have been given the power by a single adjudication to dispose of an individual's rights. The wielding of such power constitutes an unprecedented menace to liberty and democracy. (See, e.g., Wirtz, "Government by Private Groups," 13 La.L.Rev. 440 (1953); Hanslowe, "Regulation by Visible Public and Invisible Private Government," 46 Tex.L.Rev. 88 (1961). This same threat to our fundamental Constitutional framework led the court in Johnson v. Milk Marketing Board, 295 Mich. 644, 295 N.W. 346, 353 (1940) to warn: "No one should act as a judge in his own cause." cf; Carter v. Carter Coal, 298 U.S. 238 (1936).

Most importantly, the concept of psychiatric emergency, by virtue of its content and breadth, delegates a power to private psychiatry to make what is traditionally a judcial determination (i.e., legal incapability to act, thereby enabling the state

to act as parens patriae). Therefore, the proposed delegation threatens historic notions of fair trial and fair hearing. (See Liebmann, "Delegation to Private Parties," 50 Ind.L.J., pp. 657-59 (1975).

The District Court below in Rogers I. recognized the danger of the decision-making power delegated to psychiatrists should the notion of psychiatric emergency be adopted by this Court:

> [D]efendants' proffered definition of an emergency justifying forced medication -- the psychiatric emergency concept -- is too broad, subjective and unwieldy. The fact that a set of circumstances may fall within the broad parameters of a psychiatric emergency does not necessarily justify any and all responsive steps taken thereafter by a doctor, even though therapeutic and well within the standards of reasonable medical practice.
>
> This court holds therefore that a committed mental patient may be forcibly medicated in an emergency situation in which a failure to do so would result in a substantial likelihood of physical harm to that patient. Rogers I, supra at 1365.

Moreover, because the concept of psychiatric emergency is so broad and so unwieldy, the decision to forcibly medicate, once made, is not readily subject to judicial review. There is no legal standard, either implicit or explicit, contained within the definition, against which to measure the state's action. (Arizona v. Calif., supra.) The subject matter permitting forcible medication is purely medical, circumscribed only by the indeterminate boundaries of what constitutes a psychiatric emergency. The unavoidable result is a violation of fundamental due process. (See Argument I.)

Finally, should this Court find that psychiatrists may force dangerous psychotropic drugs on unconsenting involuntarily committed patients, absent an adjudication of legal incapability to act, the State will be allowed, through private psychiatry, to do what it cannot Constitutionally do directly -- abrogate the Constitutional

rights of individuals in the absence of a justifiable state interest. (See Argument I.)[15/] That private psychiatry reasonably believes that a psychiatric emergency calls for the forced administration of dangerous psychotropic drugs makes the intrusion no less invasive to involuntarily committed patients' fundamental due process rights:

> Experience should tell us to be most on our guard to protect liberty when the government's purposes are beneficent Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers lurk in insidious encroachment by men of zeal, well-meaning, but without understanding. Olmstead v. United States, 277 U.S. at 479 (1928)(Brandeis, J., dissenting).

15/ The decision to forcibly medicate would automatically be justified solely because private psychiatry, in its clinical judgment, reasonably believed that the individual would further deteriorate without immediate administration of psychotropic drugs. The result is unconsitutional, because the delegation of this decision-making power to private psychiatry automatically subrogates the individual's interest in being free from unwarranted governmental intrusions, to the interest of the state in providing care and treatment.

III. DUE PROCESS REQUIRES COURTS TO EXERCISE "SUBSTITUTED JUDGMENT" WHEN THE STATE ACTS AS PARENS PATRIAE ON BEHALF OF PATIENTS WHO HAVE BEEN JUDICIALLY DETERMINED INCOMPETENT

While it is true that "the sine qua non for the state's use of its parens patriae authority is a judicial determination of the patient's incompetence, Rogers II, supra at 657, it is also true that the exercise of the parens patriae authority is not shielded from the requirements of due process. Specht v. Patterson, 386 U.S. 605 (1967) and O'Connor v. Donaldson, supra.

In the context of forcible medication, the state's responsibility to patients with respect to due process does not end when the patient has been declared incompetent. The First Circuit below ruled that subsequent to the determination of incompetence,

> [S]tate actions based on parens patriae interests must be taken with the aim of making treatment decisions as the individual himself would were he competent to do so. cf. Superintendent of Belchertown v. Saikewicz [citations omitted] ("substituted judg-

> ment" standard). Furthermore, in order to ensure compliance with this requirement, some minimum procedural requirements would seem to be necessary. Id. at 661.

The Saikewicz case held that both competent and incompetent mental patients have a fundamental right to refuse treatment. See Colyar, supra at 430. Therefore, in order to preserve the right of the incompetent patients, courts are required to exercise a "substituted judgment" which is consistent "with the values and desires of the affected individual." Saikewicz, supra at 431.

Based on the reasoning of Saikewicz, the court in Guardianship of Roe, supra, ruled that trial courts must preserve the right of incompetent mental patients to refuse anti-psychotic drugs by exercising a "substituted judgment" on behalf of the patient. The court held that a court-appointed guardian could not constitutionally consent to the medication until the trial court had exercised a "substituted judgment"

based on a consideration of the patient's expressed preferences regarding treatment, his religious beliefs, impact upon the patient's family, the probability of adverse side effects, the consequences if treatment is refused, and the prognosis with treatment. Guardianship of Roe, supra at 56-61.

These cases establish that incompetent patients are Constitutionally entitled to a judicial determination of "substituted judgment" before anyone can consent to antipsychotic medications on their behalf. See also In re K.K.B., supra; In re Boyd, supra; and Robertson, "Organ Donations by Incompetents and the Substituted Judgment Doctrine," 76 Colum. L. Rev. 48, 57-68 (1976).

CONCLUSION

The fundamental rights to privacy and bodily integrity protect all citizens from state-inflicted bodily harm. This concept lies at the very heart of the Constitutional framework of this country. This Court

thoughout its history has acted to protect all citizens from such harm and to safeguard the fundamental rights of those whose ideas are considered unorthodox.

The forcible use of dangerous anti-psychotic drugs on citizens who are already confined by civil commitment is a shocking violation of these fundamental rights which this Court must once again protect.

This Court must uphold the right of all citizens to resist the unjustified use of these dangerous drugs and to affirm the human dignity of those who are forced to take them.

Respectfully submitted,

Sept. 28, 1981 Louis M. Aucoin III

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